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Supreme Court, U.S.
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DOCKET NO.

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1997

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY

PETITIONERS

V.

FEDERICO PENA, SECRETARY OF ENERGY and GEORGE B. BREZNAY, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, WYOMING

and

STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND, AND WEST VIRGINIA, TERRITORY OF GUAM AND THE VIRGIN ISLANDS

RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Where the Department of Energy recovers overcharges by oil companies pursuant to a statute mandating that such recoveries be used for "restitution" to those overcharged and adopts a policy and formula to do so, and then denies such funds to those it has found are entitled to restitution, do the claimants deprived of such refunds have a cause of action against the Department of Energy?

2. Is there a lack of cause of action in the above described circumstances because those overcharged could not themselves have directly sought recovery from the overcharging oil companies under the statutory provision employed by the Department of Energy ?

3. Where the Court of Appeals for the Federal Circuit, acting sua sponte, and inconsistently with its own decisions, found a lack of cause of action in the above-described situation, on the basis of a clear misreading of decisions of this Court, has the Circuit Court so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption of the case contains the names of all of the parties.

Consolidated Edison Company of New York, Long Island Lighting Company, Orange and Rockland Utilities, International Paper Company, Champion International Corporation, and Weyerhauser Company are all themselves publicly owned corporations and have no parent corporation.

Southern California Edison Company is a wholly owned subsidiary of a publicly held corporation, Edison International Inc.; Pacific Gas & Electric Co. is a wholly owned subsidiary of a publicly held corporation, PG&E Corporation; San Diego Gas & Electric Company is a wholly owned subsidiary of a publicly held corporation, Enova Company; and Federal Paper Board Co. Inc. is a wholly owned subsidiary of International Paper Company.

Orange and Rockland Utilities, San Diego Gas & Electric Company, Southern California Edison Company, and Federal Paper Board Co. Inc. have no nonwholly owned subsidiaries.

Consolidated Edison Company has one nonwholly owned subsidiary, Honeoye Storage Corporation; Long Island Lighting Company has the following nonwholly owned subsidiaries, Marquez Development Corp., LILCO Energy Systems Inc., and Island Energy Services Co., Inc; Pacific Gas & Electric Company has one nonwholly owned subsidiary, Standard Pacific Gas Line Incorporated; Champion International Corporation has the following nonwholly owned subsidiaries, Angelina & Neches River Railroad Co., and Champion Papel eCelulose LTDA; Weyerhauser Company has the following nonwholly owned subsidiaries, Mountain Tree Farm Company, North Pacific Paper Corporation, Pacific Veneer, Ltd., and SCA Weyerhauser Packaging Holding Company Asia Limited; and International Paper Company has the following nonwholly owned subsidiaries, Envases Internacional S.A., Ilford Anitec AB, Impresora del Yacque C por A, International Paper Investment Corporation, International Paper Korea Ltd.,International Paper/TOGA Brasil Ltda, IPI Corporation, Carter Holt Harvey Limited, Shanghai International Paper CNPC Ltd., and Societe Mediterranconne d'Emballages

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CITATION OF REPORTS OF OPINIONS

The Opinion of the Court of Appeals for the Federal Circuit as to which this petition for certiorari is filed is reported as Consolidated Edison Co. of New York et al v. O'Leary et al at 117 F.3d 538 (Fed. Cir. 1997).

The District Court Opinion is not reported officially. It is reported as Consolidated Edison Co. of New York et al v. O'Leary et al at 4 Energy Mgmt. (CCH) par. 26,698.

JURISDICTION

The Judgment sought to be reviewed was entered June 19, 1997.

A timely filed Petition for Rehearing was denied by Order entered August 15, 1997.

Jurisdiction of the Supreme Court is pursuant to 28 U.S.C. Sec. 1254.

STATUTES INVOLVED

The statutes involved, the pertinent text of which is set forth in the appendix are: Economic Stabilization Act Amendments of 1971, Pub. L. 92-210, 85 Stat. 743 (1971), Sections 209-211 (a), Emergency Petroleum Allocation Act of 1973, Pub. L.

93-159, 87 Stat. 27 (1973), Sec. 5(a)(1), Department of Energy Organization Act, Pub. L. 95-91, 91 Stat. 565 (1997), Sec.. 502(a), 42 U.S.C. Sec. 7192 (a), Petroleum Overcharge Distribution and Restitution Act of 1986 (PODRA), Pub. L. 99-509, 100 Stat. 1881 (1986) 15 U.S.C. Sec. 4502, Federal Courts Administration Act of 1992, Sec. 102 (a)-(d), 106 Stat. 4506 (1992).

STATEMENT OF THE CASE

This litigation is with regard to the disposition of approximately $2.9 billion in refunds recovered by the U.S. Department of Energy ("DOE") from producers and resellers of crude oil pursuant to a statutory scheme authorizing recoveries for "restitution." (Section 209 of the Economic Stabilization Act Amendments of 1971 ("ESA"), Pub. L. No. 92-210, 85 Stat. 743 (1971).

Specifically, the policy of the DOE which plaintiffs seek to challenge on behalf of 85,000 claimants is diverting from distribution to the claimants some $300 million of refunds which should be paid them in accordance with DOE's own distribution formula.

Plaintiffs have been found by DOE to be entitled to a portion of the DOE-

recovered funds in accordance with a formula promulgated by DOE, as have more than 85,000 others, on the basis of injuries suffered as a result of the overcharges for which refunds were obtained by the DOE. [1]

The basic formula which DOE adopted with regard to distribution of the recovered funds provides an award to each successful claimant of a percentage of the recovered funds equal to the claimant's percentage of purchases of refined

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[1] Because of the volume of their purchases of refined oil products, the ten plaintiffs receive, pursuant to the DOE formula, approximately 14% of the amount distributed to all 85,000 claimants; in the Complaints here, as in their activities during the past decade, plaintiffs seek relief on behalf of all 85,000 claimants. (Actually, the efforts of the six utility plaintiffs here, who receive more than three-quarters of the refunds to all ten plaintiffs, are also on behalf of their millions of electricity customers in New York and California, since, in accordance with a DOE condition of the awards to them, all of the funds they receive are passed through to their customers.)

products by all U.S. purchasers during the regulatory period, 1973-1981. The formula includes in "recovered funds" for calculation purposes certain funds distributed in the litigation in the settlement of which DOE agreed to adopt the policy of claimant restitution. In re The Department of Energy Stripper Well Exemption Litigation, (Stripper Well II), 653 F. Supp. 108 (D. Kan. 1986).[2]

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[2] Prior to the adoption by DOE in the 1986 Stripper Well settlement of the policy of awarding crude oil refunds to claimants, in some settlements DOE (and Congress, by statute in the Warner Amendment, Pub. L. 97-377,Sec. 155, 98 Stat. 1830, 1919 (1982)) distributed crude oil funds to the States (e.g. United States v. Exxon, 773 F. 2d 1240 (TECA 1985), cert. denied 474 U.S. 1105 (1986), or to the United States Treasury (e.g Payne 22 Inc. v. United States, 762 F. 2d 91 (TECA 1985), Cities Service Co v. DOE, 715 F. 2d 572 (TECA 1983). As the Federal Circuit pointed out in Texas American Oil Corporation v. U.S. Department of Energy, 44 F. 3d 1557, 1567 (Fed. Cir. 1995), such distributions were because of the perceived "pragmatic

(continued...)

Implementation of the DOE formula would require that approximately 31-32% of DOE-recovered funds be distributed to the 85,000 claimants and other claimants to be approved. (The exact percentage is not determinable until all claims are processed and until all funds subject to the policy are recovered by the DOE).

The DOE distribution policy provides that any funds recovered by it which are not awarded to successful claimants should be distributed equally to the States of the United States and the United States (Treasury) as parens patriae, in large

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[2](...continued)
impossibility of identifying and making payment to those who suffered pecuniary losses due to violations of the ESA"; the "impossibility" was eliminated by a study by DOE of the absorption of injury by refiners, establishing it to be 2.7 to 8.1%, with the balance of injury passed on, principally to end users, rather than the 100% which refiners had claimed, Report of OHA to Stripper Well Court, 7 Energy Mgmt. (CCH) par. 90,507. The Stripper Well settlement, reflecting that absorption study, and adopting a policy of restitution to injured end users, ensued.

part in acknowledgment that some 50 to 60% of refined oil products were purchased for use as automobile fuel or for home heating, and that such individual purchasers have individual claims which are too small to justify individual awards. Statement of Modified Restitutionary Policy in Crude Oil Cases, 51 Fed. Reg. 27,899 (1986), 7 Energy Mgmt. (CCH) par. 80,508A.

The primacy of restitution to identified injured claimants was endorsed by Congress in the adoption of the Petroleum Overcharge Distribution and Restitution Act of 1986 ("PODRA"), 15 U.S.C. Sec. 4501 et seq. As the Court of Appeals for the Federal Circuit itself, in an in banc opinion explained, "PODRA requires the DOE to reserve sufficient funds to make restitution to those who suffered the actual losses, 15 U.S.C. Sec. 4502(c)(1), and to pay the excess to federal and state treasuries 'as indirect restitution'", Texas American Oil Corp. v. U.S. Dept. of Energy, 44 F. 3d 1557, 1568 (Fed. Cir. 1995).[3]

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[3] In Texas American, the Federal Circuit noted that PODRA "superseded" the Warner Amendment, and its award of

(continued...)

The specific proportionality formula promulgated by DOE for individual refunds of crude oil overcharge recoveries, including the inclusion in "recovered funds" for calculation purposes of the amounts distributed to end users in Stripper Well (characterized by DOE as "full parity"), was approved by the Temporary Emergency Court of Appeals in In re The Department of Energy Stripper Well Exemption Litigation, (Stripper Well III), 857 F. 2d 1481, 1484 (TECA 1988).

However, DOE has adopted a conflicting policy, i.e to limit the portion of recovered funds to be awarded to individual claimants to 20%, even though such would thwart the DOE adopted formula, with claimants receiving less than 2/3 of the 31 to 32% to which they are entitled pursuant to the DOE restitution formula.

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[3](...continued)
recovered crude oil funds to the States; it therefore necessarily also "superseded" (i.e. eliminated the precedent of) the other settlements in which DOE had distributed refunds to the States (Exxon, supra) or the U.S. Treasury (Payne 22, supra, Cities, supra). (See footnote 2)

It is that 20% limitation which plaintiffs here seek to strike.

The origin of the 20% limitation, and its sole basis, was an estimate made by the States and the DOE in crafting the Stripper Well Settlement, in which a policy of individual claimant restitution was agreed to and announced. DOE and the States contemplated that the claims process before DOE which was to ensue would take a significant amount of time. (It has taken more than 10 years and is still not completed). Rather than await the completion of the claims process and a definitive determination of the portion of the refunds which would remain for distribution to them, they desired to obtain for public use what they believed was a conservative estimate of the funds which would remain after all claimant awards. They estimated that under no conceivable circumstances would successful claimants be awarded as much as 20% of the funds to be recovered pursuant to the DOE restitution which was to be adopted (but which was to mirror the formula already in use for refined product refunds).

Accordingly, they agreed to, and DOE has implemented, a procedure of making available immediately upon the recovery from a particular producer 80% of the funds recovered, retaining 20% in a U.S.

Treasury account for individual claimants. Under the contemplated procedure, upon the completion of the claims awards, the States and the United States would divide that portion of the 20% not in fact needed for individual claimant awards.

As it has turned out, the estimate has proven wrong.

As noted above, the proportionality formula with its judicially approved "full parity" component, would require the use of 31-32% of recovered funds for individual claimant restitution.

In the instant litigation, plaintiffs seek to have the 20% limitation stricken. The effect would be to restore to the 85,000 claimants some $300 million being diverted to the States of the United States and the U.S. Treasury.

In the District Court, the States and the United States moved to dismiss the Complaint on the basis of lack of standing on the part of plaintiffs. They argued--and the District Court agreed--that claimants to the "restitution" funds were not within the zone of interests intended to be protected by the statutory provision pursuant to which the funds were recovered "for restitution" by the DOE. ESA Sec. 209.

The Court of Appeals for the Federal Circuit, to which Court petitioners

appealed, affirmed the District Court but not on the basis on which the District Court had acted, i.e. lack of standing because the plaintiffs were not within the zone of interests intended to be protected by the statute.

Instead, the Court of Appeals, sua sponte, on a basis not briefed by the parties, held there was no cause of action properly asserted.

It did so on the basis of a series of decisions of this Court which have found a lack of an implied cause of action available to private plaintiffs in statutory provisions providing solely for a public cause of action.

Application of the principle of such cases would preclude plaintiffs from themselves invoking ESA Sec. 209 in an action against crude oil producers or resellers to recover overcharges. But the plaintiffs did not, of course, bring suit pursuant to ESA Sec. 209, but rather pursuant to ESA Sec. 211.

Moreover, in the discussion of the Supreme Court decisions upon which it relied, the Court of Appeals specifically found, contrary to the District Court, that plaintiffs were indeed within the zone of interests intended to be protected by the statutes involved.

Jurisdiction in the District Court

was pursuant to ESA Sec. 210 and 211, and 28 U.S.C. Sec. 1331. Jurisdiction in the Court of Appeals was pursuant to the Federal Courts Administration Act of 1992, Pub. L. 102-572,Sec. 102 (a), 106 Stat. 4506 (1992).

ARGUMENT

I THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THIS COURT'S EXERCISE OF JUDICIAL SUPERVISION, (i) BY MISAPPLYING DECISIONS OF THIS COURT, (ii) BY DOING SO SUA SPONTE, AND THEN DENYING RECONSIDERATION, AND (iii) BY ESTABLISHING A PRINCIPLE WHICH WOULD DENY THE FUNDAMENTAL RIGHT OF APPEAL TO CLAIMANTS REJECTED BY ADMINISTRATIVE ACTION OF THE U.S. DEPARTMENT OF ENERGY

In briefing and oral argument to a panel of the Court of Appeals for the Federal Circuit, the appellants, the federal defendants, and the States intervening as defendants, addressed only the basis on which the District Court had dismissed, i.e. lack of standing on the part of plaintiffs on the ground that they were not within the zone of interests

intended to be protected by ESA Sec. 209.

In its decision, the Federal Circuit declared that it "first must consider... whether plaintiffs have stated a valid cause of action."

It determined that they had not, based on a series of decisions of this Court holding that where a statute creates a public cause of action, it does not create an implied private cause of action unless four factors are present, including,

1. "First, is the plaintiff 'one of the class for whose especial benefit the statute was enacted'...--that, is does the statute create a federal right in favor of the plaintiff.?"

2. " Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one..."

Cort v. Ash, 422 US 66, 78 (1975)

The Federal Circuit panel found that the first factor was "unquestionably" present: "plaintiffs are a member of the class for whose benefit the statute was enacted..."

It found, however, a legislative intent to permit only the government to initiate an ESA Sec. 209 action seeking to recover oil overcharges from a producer of oil, principally by virtue of the

existence of a parallel provision of the ESA, Sec. 210, pursuant to which private litigants may seek to recover overcharges from a producer of oil.[4]

The panel reasoned that since private litigants had a statutorily provided cause of action, they have no implied right to prosecute an overcharging oil producer under ESA Sec. 209.

But the principle established--that these plaintiffs cannot invoke ESA Sec. 209 to sue an oil producer to recover overcharges--has no applicability to the instant situation.

Plaintiffs have not brought an action against an oil producer, but rather against the Secretary of Energy, essentially appealing a series of

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[4] In National R.R. Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453 (1974), the case principally relied upon by the Court, this Court held that an association of railroad passengers could not sue Amtrak to precude announced train discontinuances on the basis of an argument that since the statute provided for such actions by the Attorney Gneral, affected passengers had the implied right to bring such a suit.

decisions of the DOE denying them the full fruits of overcharge recoveries already made by the DOE from oil producers.

And plaintiffs' asserted cause of action was not brought pursuant to ESA Sec. 209, but rather pursuant to ESA Sec. 211 which clearly contemplates actions against the DOE as a method of appealing an administrative action denying, or improperly limiting, recovery. McCulloch Gas Processing v. Canadian Hidrogas, 577 F. 2d 712 (TECA 1978).[5]

In a Petition for Rehearing and Suggestion for Rehearing In Banc, these petitioners explained the inapplicability

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[5] In an earlier decision, TECA had held that ESA Section 210(a) provides standing to challenge agency orders, American Nursing Home Association v. Cost of Living Council, 497 F. 2d 909 (TECA 1974); the language of the statute and the legislative history both support such an interpretation of Sec. 210. S. Rep. 92-507, 92d Cong., 1st Sess., reprinted in 1971 U.S.C.A.A.N. at 2291, and at least one District Court decision since McCulloch has held that a challenge to a DOE order was properly brought under Sec. 210. Exxon Corp. v. DOE, 577 F. Supp. 703, 705 (D. Del. 1983)

of the principle that a private party could not initiate an enforcement action against an oil producer pursuant to ESA Sec. 209 to the situation here involved, i.e. a challenge to DOE with regard to the distribution of recoveries it had already made pursuant to ESA Sec. 209.

Both the Petition for Rehearing and Suggestion for Rehearing In Banc were denied, without comment despite the fact that the panel initially had departed from the accepted and usual course of judicial proceedings by (i) deciding the case on a basis not argued by the parties, and (ii) in the course of the decision rendered a determination that the District Court had erred in the very ruling on the basis of which it had dismissed the Complaint; the basis of the District Court decision was a holding that the plaintiffs were not within the zone of interests intended to be protected by ESA Sec. 209, while the Federal Circuit panel held that "plaintiffs are a member of the class for whose benefit the statute was enacted."

Under such circumstances, and where the precedents relied upon by the panel were clearly inapplicable to a suit against DOE as to already recovered funds, it was a further and inexcusable departure from the accepted and usual course of judicial proceedings to deny rehearing.

The principle implemented by the Federal Circuit in the instant matter is presumably that those who are the intended beneficiaries of restitution pursuant to ESA Sec. 209 have no cause of action to challenge the denial or limitation of restitution awards to them.

In the instant case, the challenge they sought to mount was to a limitation on awards to those whose right to restitution has been recognized, i.e. the plaintiffs and 85,000 others. The limitation involved, i.e. that no more than 20% of recovered funds can be used for individual claimant restitution, has the effect of limiting the restitution awards to some two-thirds of that to which the DOE judicially-approved formula would provide them. (As noted, the formula would require the use of 31-32% of recovered funds for individual claimant restitution; each approved claimant will accordingly receive only 20/31-32 of that to which they are entitled by the DOE formula.)

But the newly announced principle is, of course, not limited to this case.

Its most clearly parallel potential application would be to deny the right to approved individual claimants to challenge a possible decision of the DOE not to continue the distribution. To date, the DOE has made two distributions to approved

claimants, an initial distribution of $800 per million gallons of refined product purchases by each claimant during the regulatory period, and an "interim" distribution of an additional $800 per million gallons. An estimated $160 million or more (beyond that needed for initial and interim payment to claimants yet to be approved) has been, or will be, placed in the U.S. Treasury escrow for individual claimants. Pursuant to DOE policy to distribute such funds to approved claimants, such will result in a minimum additional distribution to each approved claimant of $400 per million gallons.

But the DOE has indicated in recent decisions approving claimants that it has not yet determined whether to honor its policy and the statutory mandate of ESA Sec. 209 and PODRA to distribute the available funds to approved claimants. Should the DOE decline to do so, the principle established by the instant decision, if applied, would presumably preclude a challenge to such a decision by the claimant beneficiaries.

And the principle of the Federal Circuit decision here would also presumably deny the right of any claimant with a pending claim to challenge in court a decision by the DOE to deny the claim in whole or in part. Such a right has not

only been universally recognized by the courts (see the discussion in II below), but was here acknowledged both by the DOE and the States in their briefing and oral arguments. Most troublesome questions of equal application would be presented if, after more than a decade in which the right of individual claimants to judicial appeal has been recognized, such a right was eliminated as to the remaining unresolved claims.

II THE COURT OF APPEALS FOR THE FEDERAL CIRCUIT, WHICH HAS EXCLUSIVE APPELLATE JURISDICTION, HAS RENDERED A DECISION ON AN IMPORTANT MATTER IN CONFLICT WITH ITS OWN DECISIONS, THOSE OF ITS PREDECESSOR, THE TEMPORARY EMERGENCY COURT OF APPEALS, AND THOSE OF THE DISTRICT COURTS

Prior to the decision here, the appellate Courts with exclusive ESA jurisdiction (first TECA, and now the Federal Circuit) have not questioned the existence of a cause of action by individual claimants to appeal DOE orders, either orders denying participation before OHA, or orders denying ESA Sec. 209 restitution to private claimants. Repeatedly, they have merely moved to the merits.

Suffice it to note as examples, in the first category, Consolidated Edison Co. v. Breznay, 873 F.2d 301, 311 (TECA 1989), the Court noting that "(t)here are many cases of this Court and administrative orders of OHA holding that a timely and appropriate request to participate in an enforcement (ESA Sec. 209) proceeding should be granted by OHA..."; and, in the latter category, Mullins v. U.S. Department of Energy, 50 F. 3d 990 (Fed. Cir. 1995), in which, in dissent on the merits of the challenge, Chief Judge Archer noted, without disagreement by the majority: "Energy does not, however, have unfettered discretion to decide how to allocate this restitution. Congress provided that interested parties may appeal such decisions to the district courts...and that any appeal from a district court's decision will be had to the Federal Circuit..." (50 F. 3d at 993)[6].

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[6] In recognizing the right of individual claimants to challenge restitution awards, Mullins "superseded" the earlier TECA decisions such as Exxon, supra, Payne 22, supra, Cities, supra, which denied the right of individual

(continued...)

The decision in Mullins is particularly significant as an expression of the unvarying assumption of both the Federal Circuit and its predecessor as the designated appellate court in ESA matters, the Temporary Emergency Court of Appeals, that there is a cause of action against DOE which may be brought by disappointed claimants where DOE decisions have limited awards.[7]

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[6](...continued)
claimants to challenge crude oil refund awards to the States and the U.S. Treasury, holding that they had no standing because they were not within the zone of interests intended to be benefitted by the ESA. (See footnote 2). It therefore eliminated the basis on which the District Court acted here, i.e. finding a lack of standing because the plaintiffs do not "fall within the zone of interests meant to be protected by the statutory scheme." So the Federal Circuit recognized here, finding that "unquestionably" "plaintiffs are a member of the class for whose benefit the statute was enacted..."

[7] The exclusive jurisdiction of the Temporary Emergency Court of Appeals was (continued...)

In Mullins, the dispute was over the allocation of the amount of $1.25 billion recovered from Texaco in an ESA Sec. 209 settlement. The issue was to what extent the recovery should be attributed to violations by Texaco as a crude oil producer ("crude oil refunds"), and to what extent to Texaco as a refiner ("refined product refunds"). The allocation was important because only those who purchased directly from Texaco were eligible to divide the refined product refunds, while all purchasers of product refined in the United States were entitled to claim from the crude oil refunds. In Mullins, a group of claimants eligible to share only in the refined product refunds brought action to require DOE to allocate more of the recovery to refined product refunds than it had initially done.

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[7](...continued)
transferred to the Court of Appeals for the Federal Circuit by the Federal Courts Administration Act of 1992, Sec. 102, Pub. L. 102-572, 106 Stat. 4506. The decisions of TECA were adopted "as precedent" by the Federal Circuit in Texas American Oil Corp. v. Dept. of Energy, supra, 44 F. 3d at 1561.

TECA reversed a District Court decision which had dismissed the action on the ground of lack of ripeness, TECA holding that the issue was ripe for determination because the shift of funds to the refined product pool would increase the amounts to be received by refined product claimants Mullins v. U.S. Department of Energy, 964 F. 2d 1149, 1151 (TECA 1993).[8] On remand in Mullins, the District Court considered the DOE allocation on the merits and refused to disturb it, and the Federal Circuit (which had by then succeeded TECA as the appellate court in ESA matters) affirmed. 821 F. Supp. 1194 (W.D. Ky 1993), 50 F. 3d 990 (Fed. Cir. 1995). Neither the DOE nor the Federal Circuit raised any issue as to the existence of a cause of action challenging a decision of DOE to limit awards to approved claimants by virtue of

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[8] As TECA noted, DOE had no objection to the justiciability of the matter as framed by TECA: "The Appellees do, however, acknowledge that if the issues in the Plaintiffs' original Complaint had been framed as the Plaintiffs have now framed the issues on appeal, Plaintiffs would have stated a valid claim that is ripe for resolution."

allocation of recovered funds.

The cause of action asserted here is precisely of the same nature. Indeed, the issue here involves a sub-allocation of the funds allocated to crude oil refunds; in the instant matter, those who will share in the crude oil refunds obtained from Texaco (and other crude oil producers) complain of the allocation of those crude oil refunds by DOE, i.e. limiting the award of Texaco funds to individual claimants to 20% of the crude oil refunds, and distributing 80% to the States and the United States.[9]

If a complaint as to the allocation of refunds as between refined product refunds and crude oil refunds asserts a cognizable cause of action, then a

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[9] The Texaco recovery was the largest single recovery from any producer, and represents more than one-third of the crude oil refunds which DOE is distributing, 20% to claimants and 80% to the States and the United States. By awarding to claimants only 20% rather than the 31-32% to which they are entitled by the DOE allocation formula, DOE is depriving individual claimants of more than $100 million in this case alone.

complaint as to the allocation of the crude oil refunds necessarily sets forth a cause of action.

Thus, the instant Federal Circuit decision is entirely inconsistent with the decisions of both TECA and the Federal Circuit in Mullins. However, not only has the Federal Circuit not repudiated or overruled Mullins in the instant decision, but it has cited Mullins as authority for dismissal on the merits of a contention by plaintiffs here as to the allocation of any funds to the United States from refunds obtained in one of the matters as to which DOE has made a 20%-80% distribution, a settlement with Occidental Petroleum Corporation. Thus, the instant decision is also internally inconsistent, acknowledging a cause of action potentially exists as to the allocation to the United States in the Occidental Petroleum matter, while denying that there is a cause of action as to allocation as between the claimants on the one hand and the United States and the States on the other hand as to the very same Occidental Petroleum refunds.

The instant decision is also inconsistent with the in banc decision of the Federal Circuit in Texas American, supra. In that decision, as already noted, the Federal Circuit explained that "PODRA

requires the DOE to reserve sufficient funds to make restitution to those who suffered the actual losses, 15 U.S.C. Sec. 4502(c)(1), and to pay the excess to federal and state treasuries 'as indirect restitution'", 44 F. 3d at 1558.[10]

The principle of the instant holding, that "those who suffered the actual losses" are without a cause of action to assert that DOE has failed to "reserve sufficient funds to make restitution" to

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[10] The Federal Circuit in banc holding quoted in the text rejected the basis of the TECA denial of intervention to private claimants in Getty Oil Co. v. DOE, 865 F. 2d 270, 276 (TECA 1988), i.e. "PODRA confers no legally cognizable interest in appellants (including plaintiffs here) sufficient to create a right to intervene..." Moreover, the denial in Getty of the standing of claimants to intervene to challenge allocation of refunds has been eliminated as a precedent both by the TECA decision in Mullins implicitly recognizing standing in such a situation, and by the holding of the Federal Circuit here that claimants are within the zone of interests intended to be benefitted by ESA Sec. 209 and PODRA.

them precludes any possibility of enforcement of the mandate of PODRA as enunciated by the Federal Circuit.

Such two inconsistent holdings--that individual claimants are entitled to sufficient funds, but they are without the right to obtain them, require action of this Court at least to as great an extent as do conflicting decisions of two separate Courts of Appeals.

Moreover, such inconsistency within the same Court, as is represented by Mullins and Texas American on the one hand and the instant decision on the other, demonstrate such departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

Nor is Mullins alone as a case in which a cause of action to challenge DOE refund awards was recognized and disposition was made on the merits.

For a decade, the courts have entertained and disposed on the merits of challenges by disappointed claimants to funds obtained by DOE from alleged overcharging oil companies.

With the adoption of a policy of crude oil refund awards to claimants, disappointed claimants sought judicial review of DOE decisions denying them recovery in whole or in part. DOE made no

objection to the existence of a cause of action, or the standing of the disappointed claimants to assert such, and the courts in which relief was sought themselves found no lack of cause of action or standing, but moved on to merit determinations, sometimes affirming and sometimes reversing DOE.(e.g. Florida Rock Industries v. John S. Herrington et al, 700 F. Supp.605 (D.D.C. 1988), Mid-America Dairymen Inc. v. Herrington, 878 F. 2d 1448 (TECA 1989) and City of New York v. Watkins, 757 F. Supp. 72 (D.D.C. 1991)[11]

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[11] In so recognizing a cause of action and the standing of crude oil refund claimants to complain of the denial of funds by DOE, DOE and the courts were applying in such cases the precedent of recognized standing in connection with claims for refined product refunds, e.g. Atlantic Richfield Co. v. DOE, 618 F. Supp. 1199 (D. Del. 1985.) (In refined product overcharge cases, (i) the violations were by refiners, resellers or retailers, (ii) there had been no conflicting claims preventing individual claimant awards, and (iii) the DOE had adopted a policy of

(continued...)

Nor did either DOE assert, or TECA find, either lack of standing or a failure to state a cause of action when claimants denied refunds asserted a right to refunds on behalf of an entire class in Burlington Industries v. Watkins, 916 F. 2d 722 (TECA 1990). There, suit was brought by a group of claimants denied restitution in the DOE proceedings because they, or affiliates, had recovered for a part of their oil product purchases in Stripper Well (e.g. a manufacturer claimant before OHA whose trucking division had recovered for its trucking use in Stripper Well), and had executed waivers of the right to additional refunds. Thus, essentially claimants who had received a refund, but in their view an inadequate one, were suing to recover additionally. (This is the precise situation here, plaintiffs asserting that their recoveries are improperly diminished by virtue of the 20% limitation.)

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[11](...continued)
such awards immediately after deregulation made it impossible to rectify overcharges through the regulatory mechanism, e.g. Office of Special Counsel/ Tenneco Oil Co., 9 DOE (CCH) par. 82,538 (1982).

Significantly, when these same plaintiffs previously sought to challenge the 20% limitation, their complaint as to the limitation was dismissed for lack of ripeness (because it was not yet clear that the proportionality formula would require the use of more than 20% of the funds recovered), but not either for lack of standing or for the failure to state a cause of action. Consolidated Edison Co v. Herrington, 752 F. Supp. 108 (D.D.C. 1990), affirmed "on the basis of the district court opinion" 927 F. 2d 1227, 1228 (TECA 1991).[12]

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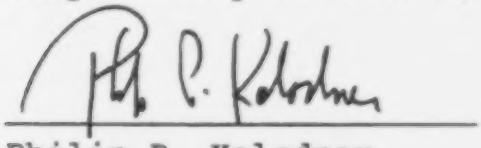
[12] The failure of DOE to assert, and of the Court to find, lack of standing as to the 20% limitation is particularly significant because the DOE there challenged successfully other counts of the same complaint on the basis of lack of standing.

CONCLUSION

For the reasons above stated, a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

United States Court of Appeals
for the Federal Circuit
96-1248, -1257

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY,
Plaintiffs-Appellants,

v.

Hazel R. O'Leary, SECRETARY OF ENERGY, and George B. Breznay, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY,
Defendants-Appellees,

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, and WYOMING,
Defendants-Appellees,

and

STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND, and WEST VIRGINIA, and TERRITORY OF GUAM AND THE VIRGIN ISLANDS,

Defendants-Appellees.

DECIDED: June 19, 1997

Before MICHEL, PLAGER, and BRYSON, Circuit Judges.

Plager, Circuit Judge.

At issue in this appeal from judgments of the United States District Court for the District of Columbia[1] is entitlement to a portion of some $2.9 billion recovered by the United States. The money was recovered from producers and resellers of crude oil pursuant to a statutory scheme authorizing such recoveries. See Economic Stabilization Act Amendments of 1971, Section 209, Pub. L. No. 92-210, 85 Stat. 743 (1971). Plaintiffs, a group of utilities and other large crude oil consumers, are entitled to share in the proceeds under the formula established by the Government, but complain that the share they are receiving is sufficient. In two separate suits, consolidated by the district court and here, they sued the United States, through the Department of Energy, and a group of states, all of whom are, under the formula, competing claimants for the fund.

The district court dismissed both complaints, and the plaintiffs brought their appeals here. The two questions presented are whether the appeals are properly lodged in this court, and whether the district court

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[1]Consolidated Edison Co. Of New York v. Hazel R. O'Leary, Nos. 96-0225 and 95-0698 (D.D.C.)

correctly gave judgment for the defendants. They are, and it did. Affirmed.

1. BACKGROUND

The Economic Stabilization Act (hereafter "the Act" or "ESA"), first enacted in 1970 and amended in substantial ways in 1971, authorized the President to issue orders and regulations to stabilize prices, rents, wages, and salaries. The Executive actions taken under the Act resulted in lengthy and enduring litigation. This is one of those suits.

Under the initial Act, the method of enforcement was by injunction or fine. See Economic Stabilization Act, Pub. L. No. 91-379, 84 Stat. 799 (1970). In 1971 Congress amended the Act, inter alia, to permit district courts, in enforcement suits brought by the Attorney General of the United States, to order "restitution of moneys received in violation" of these price controls. Economic Stabilization Act Amendments of 1971, Section 209, Pub. L. No. 92-210, 85 Stat. 743 (1971).

The amended Act, in separate section 210, also provided for a private cause of action for persons "suffering legal wrong because of any act or practice arising out of this title" in violation of the price controls. This "private attorney general" provision allowed private litigants to recover

money damages (including treble damages and attorneys fees in some cases) in addition to obtaining injunctive relief. Id.

A few years later, in response to the oil embargo by the Organization of Petroleum Exporting Countries (known as "OPEC"), Congress passed the Emergency Petroleum Allocation Act of 1973 ("EPAA"), Pub. L. No. 93-159, 87 Stat. 627, codified at 15 U.S.C. §753(b)(1)(F) (1982). Petroleum price regulations were subsequently promulgated by the Department of Energy (then called the Federal Energy Office). See 15 U.S.C. §754(a)(1) (1982).

Thus a comprehensive regulatory scheme was established pursuant to the EPAA and enforced under Section 209 of the ESA. IN due course the implementation and enforcement of this scheme produced huge recoveries for crude oil overcharges. Not surprisingly, there was an ensuing struggle over how this money would be distributed. This struggle came to a head in the multi-district litigation entitled In re The Department of Energy Stripper Well Exemption Litigation, conducted in the District Court of Kansas. See generally In re The Dept. of Energy Stripper Well Exemption Litigation, 653 F.Supp. 108 (D. Kan. 1986) (Stripper Well). As the district court judge noted in that case, "Like flies to honey, claimants are quickly drawn by a fund containing over one billion dollars."

Stripper Well, 578 F.Supp. 586, 589 (D. Kan. 1984). The particular violations involved in that case are not directly relevant to the present case. What is relevant, however, is the resulting DOE distribution policy that flowed therefrom.

Patterned after the eventual settlement in Stripper Well, DOE established a policy for allocating all crude oil overcharges recovered pursuant to Section 209 of the ESA. That policy established that 20% of the overcharges would be retained by DOE to pay individual claims. The remaining 80% was to be allocated half to the United States treasury and half divided evenly among affected states to be used to fund approved energy-related programs that are designed to benefit consumers of petroleum products within the states. See Statement of Modified Restitutionary Policy In Crude Oil Cases, 51 Fed. Reg. 11,737, 11,739 (Aug. 20, 1986). This was essentially the same allocation formula arrived at in the Stripper Well settlement. As DOE stated in its policy statement, the "settlement negotiations provided an appropriate vehicle for exploring the resolution of those issues in all crude oil cases." 51 Fed. Reg. at 11,738.

The 20% portion of crude oil overcharges to be distributed to individual claimants was to be apportioned according to a system administered by DOE. This system is known as

"Subpart V" after the corresponding DOE regulations. See 10 C.F.R. Part 205, Subpart V. In this system, claimants are entitled to a refund proportional to their volume of crude oil consumption. Stated simply, under this method, known as the overcharge moneys (the "numerator") by the total volume of U.S. consumption of petroleum products during the period of price controls (the "denominator"). This resulting fraction is then multiplied by the individual's volumetric consumption to produce the resulting refund. See Notice Explaining Procedures for Processing Refund Applications in Crude Oil Refund Proceedings Under 10 C.F.R. Part 205, Subpart V, 52 Fed. Reg. 11,737, 11,740 (April 10, 1987). Included in the numerator, for purposes of calculating claims, is an additional amount of some $985 million equal to the amount distributed in Stripper Well, in order to bring claimants into "full parity" with those who recovered under Stripper Well. 51 Fed. Reg. at 11,739.

As noted, appellants in this consolidated appeal are a group of utility companies and pulp and paper companies

(hereafter referred to collectively as "plaintiffs").[2] They are among some 85,000 individual claimants seeking to share in that portion of the fund allocated to such individual claimants under the Subpart V program. Because of the volume of their purchases of crude oil, the ten plaintiffs receive, pursuant to the formula, approximately 14% of the moneys distributed to all 85,000 claimants. The utility companies, which receive more than three-quarters of the refunds to the ten plaintiffs, are obligated to pass the funds through to their customers.

Plaintiffs filed two complaints in the district court for the District of Columbia. In their first complaint, No. 95-CV-698, they sought a declaratory judgment that the 20% limit imposed by DOE should not be used to limit claims under the Subpart V program.[3] In

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[2]Plaintiffs brought their suits as class actions under Federal Rule of Civil Procedure 23(a). The class, however, was never certified by the district court.

[3]In an additional count, plaintiffs challenge a proposed distribution to the Defense Logistics Agency ("DLA") of the United States on the ground that the DLA is a government agency, which should be paid out of the share allocated to the United States. Since plaintiffs' right to bring this count is

the second complaint, No. 96-CV-225, they challenged the allocation of $275 million received from a settlement of overcharges by Occidental Petroleum Corporation (OXY). They sought a preliminary injunction to preclude DOE from distributing 80% of the available OXY refunds to state and federal governments. The district court denied the requested preliminary injunction and dismissed both complaints on the grounds that plaintiffs did not have standing to assert their claims.

Plaintiffs brought their appeals here, but also filed protective appeals in the Court of Appeals for the District of Columbia Circuit. Unopposed motions were filed in, and granted by, that court, deferring briefing until this court determines whether it has jurisdiction over the appeals.

II. DISCUSSION

A. JURISDICTION

The first question is, which is the proper forum for appellate review, this court or the United States Court of Appeals for the District of Columbia Circuit. The district court exercised jurisdiction over plaintiffs' complaint pursuant to Section 211 of the ESA,

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subsumed under the discussion regarding their second complaint, infra, it is not discussed separately.

which vests district courts with jurisdiction over "cases or controversies arising under this title, or under regulations or orders issued thereunder. . . ." ESA §211(a). We have jurisdiction over this appeal from the district court's judgment pursuant to 28 U.S.C. §1295(a)(11), which vests this court with appellate jurisdiction over "an appeal under section 211 of the [ESA]." See Texas Am. Oil Corp. v. United States Dept. of Energy, 44 F.3d 1557, 1563 (Fed. Cir. 1995) (Jurisdiction is proper if: "(1) the resolution of the litigation must have required application or interpretation of the EPAA/ESA or its regulations, and (2) the EPAA/ESA issue must have been adjudicated in the district court."). In short, jurisdiction was properly exercised by the district court, and the appeal is properly before us.

B. PLAINTIFFS' CLAIMS

1. CHALLENGE TO THE 20% LIMIT

It is established law that a complaint should be dismissed for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Even assuming the facts asserted in the complaint are true, which we are required to do in reviewing the grant of a motion to

dismiss, plaintiffs cannot prevail on their challenge to the 20% cap.

Congress established a bifurcated system for enforcing the ESA. Under Section 209, as added in 1971, Congress authorized "the Attorney General to bring an action in the appropriate district court of the United States" for violation of price controls established by order or regulation pursuant to the Act. This public cause of action is enforceable by injunction, as well asa by a court order for "restitution of moneys received in violation of any such order or regulation." The legislative history makes clear that Congress wanted courts to have the power to "set things right" by ordering restitution in appropriate cases. S. Rep. No. 92-507, at 9 (1971).

DOE acting under this authority has recovered large sums from companies that violated these price controls. See, e.g., Stripper Well ($1 billion); Final Consent Order with Occidental Petroleum Corp., 60 Fed. Reg. 43130 (Aug. 18, 1995) ($275 million); Final Consent Order with Murphy Oil Corp., 59 Fed. Reg. 47315 (Sept. 15, 1994) ($10.7 million); Final Consent Order with Salomon Inc., 55 Fed. Reg. 47374 (Nov. 13, 1990) ($83.75 million); Final Consent Order with Howell Corp., 54 Fed. Reg. 18138 (Apr. 27, 1989) ($19.375 million); Final Consent Order with Texaco, Inc., 53 Fed. Reg. 32929 (Aug.

29, 1988) ($1.25 billion); Final Consent Order with Enron Corp., 53 Fed. Reg. 28260 (July 27, 1988) ($48 million); Final Consent Order with Phillips Petroleum Co., 53 Fed. Reg. 10928 (Apr. 4, 1988) ($30 million); Final Consent Order with Exxon Corp., 51 Fed. Reg. 36052 (Oct. 8, 1986) ($36.9 million); Final Consent Order with Marathon Petroleum Co., 51 Fed. Reg. 3820 (Jan. 30, 1986) ($30 million); Final Consent Order with Atlantic Richfield Co., 50 Fed. Reg. 26603 (June 24, 1985) ($65.7 million); Final Consent Order with Gulf Oil Corp., 50 Fed. Reg. 24929 (June 14, 1985) ($142 million); Final Consent Order with Mobil Oil Corp., 49 Fed. Reg. 30354 (July 39, 1984) ($27 million).

In addition to authorizing the Attorney General of the United States to pursue violators, Congress in the 1971 amendments also authorized individuals "suffering legal wrong" to bring an action against violators. Section 210 of the ESA authorizes:

> Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment,

> writ of injunction (subject to the limitations in section 211), and/or damages.

This section further vests district courts with the power to award treble damages and attorneys' fees. See ESA §210(b). Congress adopted this section "so that it would serve not only to provide a means to recover losses, but [to] provide a strong deterrent to those who would willfully violate this Act." H. Rep. No. 92-714, at 8 (1971). Congress thereby created a powerful incentive for harmed individuals to vindicate their private rights under this section of the ESA, paralleling those in other statutory schemes. See, e.g., 15 U.S.C. §15 (1994) (violation of antitrust laws); 12 U.S.C. §2607 (1994) (violation of anti-kickback laws); 7 U.S.C. §2570 (1994) (violation of plant variety protection laws).

In view of Congress' decision to separately structure public and private remedies under the ESA, the question emerges whether a private complaint states a claim upon which relief may be granted when the complaint challenges the allocation of funds obtained under the public remedies section of the Act. Although the district court dismissed the present complaints for lack of standing, and it was that issue that was briefed by the parties before this court, we first must consider whether the action is

maintainable, that is, whether plaintiffs have stated a valid cause of action, "for it is only if such a right of action exists that we need consider whether the respondent had standing to bring the action. . . ." National R.R. Corp. v. National Ass'n of R.R. Passengers, 414 U.S. 453, 456 (1974) (Amtrak).

The Supreme Court has fashioned a four-factor test to determine whether a private cause of action should be implied from a statute not expressly providing one.

> First, is the plaintiff "one of the class for whose especial benefit the statute was enacted," --that is, does the statute create a federal right in favor of the plaintiff? Second, is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one? Third, is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff? And finally, is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?

Cort v. Ash, 422 U.S. 66, 78 (1975) (internal citations omitted). Two of the four factors unquestionably support plaintiffs' position: plaintiffs are a member of the class for whose benefit the statute was enacted and there are no comparable state statutes governing price controls. Subsequent cases, however, have made clear that the remaining two factors predominate. "[U]nless this congressional intent can be inferred from the language of the statute, the statutory structure, or some other source, the essential predicate for implication of a private remedy simply does not exist." Northwest Airlines, Inc. v. Transport Workers, 451 U.S. 77, 94 (1981); Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985); Amtrak, supra.

In Amtrak, the Court considered whether respondents had a private cause of action to challenge certain train discontinuances in light of §307(a) of the Rail Passenger Service Act of 1970 ("Amtrak Act"), 84 Stat. 1327, codified at 45 U.S.C. §501 et seq. That section vested the district courts with jurisdiction over violations of the Amtrak Act as well as created a "public cause of action, maintainable by the Attorney General, to enforce the duties and responsibilities imposed by the Act." Amtrak, 414 U.S. at 457. In addition, section 307(a) provided a private cause of action, as in the present case, but

only under certain circumstances.[4] Id. at 460. Respondents argued in that case that the court should imply a private cause of action because they "are the intended beneficiaries of the Act." Id. The district court dismissed for lack of standing. The court of appeals

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[4]Section 307(a) provided:

> If the Corporation or any railroad engages in or adheres to any action, practice, or policy inconsistent with the policies and purposes of this chapter, refuses, fails, or neglects to discharge its duties and responsibilities under this chapter, or threatens any such violation, obstruction, interferences, refusal, failure, or neglect, the district court of the United States for any district in which the Corporation or other person resides may be found shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General of the United States or, in a case involving a labor agreement, upon petition of any employee affected thereby, including duly authorized employee representatives, to grant such equitable relief as may be necessary or appropriate to precedent or terminate any violation, conduct, or threat.

reversed and held that respondents, who represented railroad passengers, had standing and that §307 did not bar a private suit. The Supreme Court reversed.

In reaching its decision, the Court was influenced by the existence of a carefully crafted remedial scheme that included both public and private, albeit limited, enforcement. The Court relief heavily on the "frequently stated principle of statutory construction . . . that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." Amtrak, 414 U.S. at 458 (citing Botany Mills v. United States, 278 U.S. 282, 289 (1929)).

As noted, section 209 of the ESA creates as public cause of action to enforce price controls. Section 210 creates a private cause of action to enforce the same. In construing the statutory language, we are guided by our predecessor court's oft-cited warning against "commingling of private and agency enforcement devices for which Congress has made separate provision. . . ." Payne 22, Inc. v. United States, 762 F.2d 91, 93 (Temp. Emer. Ct. App. 1985) (citation omitted). In light of this, we conclude that to stretch section 209 so as to encompass plaintiffs' private claims would be to "expand the coverage" of Section 209 "to

subsume" those remedies explicitly provided in Section 210.

The legislative history does not alter our construction of Section 209. That history makes clear that Section 210 is the exclusive remedy for private litigants. "This action [under Section 210] is intended to be brought by private persons against other private persons. The Government will not bring such action nor be the subject of one." S. Rep. No. 92-507, at 9 (1971); see Cities Service Co. v. Department of Energy, 715 F.2d 572, 573 (Temp. Emer. Ct. App. 1983) ("While sections 209 and 210 have a common purpose--the enforcement of DOE's regulations--they vindicate different rights."). If plaintiffs have been injured by overcharges, Congress created a generous remedy for private litigants in Section 210. In cases such as this, when Congress has provided a generous private remedy, we should be even more reluctant than the Court was in Amtrak to imply a private cause of action into a public one for fear of upsetting the delicate balance that Congress struck. See Massachusetts Mutual, 473 U.S. at 146 ("The six carefully integrated civil enforcement provisions found in §502(a) of the [ERISA] statute . . . provide strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly."). Thus we conclude, as did the trial court, that plaintiffs' complaint

challenging the 20% limit should be dismissed.[5]

2. CHALLENGE TO INDIVIDUAL DISTRIBUTIONS

Plaintiffs' second complaint challenged DOE's distribution of funds received from a settlement for overcharges by Occidental Petroleum. In this complaint plaintiffs requested that the district court order DOE to reallocate the 40% payable to the federal government to the claimants' pool thereby bringing their pool's share up to 60%, i.e., 20% + 40% = 60%. Their basis for this claim was that even this increased amount was less than plaintiffs would have been entitled to had the Government not settled a potential $1.1 billion claim for a mere $275 million. Plaintiffs cite Mullins v. Department of Energy, 50 F.3d 990 (Fed. Cir. 1995) for support, on the theory that since we reached

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[5]Plaintiffs also rely on the Petroleum Overcharge Distribution and restitution Act of 1986 (PODRA), 15 U.S.C. §4501 et seq. In its complaint. The PODRA, however, provides only for the recovery of refunds through administrative proceedings that are consistent with the 20% limit. See 15 U.S.C. §4502(b)(1)(A)-(C) (1994). Accordingly, a cause of action does not lie under that statute.

the merits of the claim, we must have implicitly decided that there was standing to challenge the allocation under §209.

We agree with plaintiffs that Mullins decides the fate of this complaint. We disagree, however, as to what that fate is. In Mullins this court reviewed a challenge by several gasoline station owners to a final consent order between DOE and Texaco for alleged overcharges. Texaco's liability was estimated to be "in the billions of dollars." Id. at 991. The final settlement, however, set Texaco's liability at $1.2 billion. The settlement fund was to be allocated between two funds: one for restitution for violations regarding sales of crude oil, the other for restitution for violations regarding sales of refined products. Despite an initial estimate that attributed 84% of the overcharges due to crude oil sales and 16% due to the sale of refined products, the final allocation reserved 90% for the crude oil fund and 10% of the refined fund. Plaintiffs in that case challenged this allocation as inequitable and not supported by substantial evidence. Id. at 992. This court held that this allocation is effectively unreviewable on appeal, "[m]uch like the decisions of prosecutors regarding who to prosecute and who not." Id. at 993.

The same is true in this case. Plaintiffs are challenging the settlement as well as the allocation between various funds

of moneys received from an individual violator. This they cannot do under Mullins; the decision regarding the amount to settle for in a given case, in the absence of fraud or collusion, is a decision within the discretion of DOE. Id. As such it is non-justiciable. See Murphy v. United States, 993 F.2d 871, 873 (Fed. Cir. 1993) ("We have emphasized that judicial review is only appropriate where the Secretary's discretion is limited, and Congress has established 'tests and standards' against which the court can measure his conduct. Unless such a test or standard is provided, courts must abstain." (Internal citations omitted); Voge v. United States, 844 F.2d 776, 780 (Fed. Cir. 1988). Accordingly, we affirm the district court's judgment with respect to No. 96-CV-225.

In sum, the district court dismissed plaintiffs' complaints for lack of standing. Rather than resting our decision on standing we conclude that, with regard to the 20% cap, plaintiffs have failed to assert a claim upon which relief can be granted because private claimants have no express or implied cause of action under Section 209 of the ESA or under the PODRA. Plaintiffs' challenge to the distribution of funds received as a result of individual settlements likewise fails because this is a matter committed to the discretion of the agency.

CONCLUSION

Accordingly, the decisions of the district court dismissing both complaints are AFFIRMED.

United States Court of Appeals
for the Federal Circuit
96-1248, -1257

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY,
Plaintiffs-Appellants,

v.

Hazel R. O'Leary, SECRETARY OF ENERGY, and George B. Breznay, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY,
Defendants-Appellees,

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, and WYOMING,
Defendants-Appellees,

and

STATES OF DELAWARE, HAWAII, ILLINOIS,
KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA,
RHODE ISLAND, and WEST VIRGINIA, and
TERRITORY OF GUAM AND THE VIRGIN ISLANDS,
Defendants-Appellees.

JUDGMENT

ON APPEAL from the UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

in CASE NO(S). 96-0225, 95-698

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

DATED June 19, 1997

Jan Horbaly, Clerk

ISSUED AS A MANDATE: August 22, 1997

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONSOLIDATED EDISON CO. OF NEW YORK, et al. Plaintiffs	:	
v.	:	Civil Action Nos. 96-0225,
HAZEL R. O'LEARY, SECRETARY ENERGY, UNITED STATES, et al. Defendants	:	95-0698 (HHG)

Filed Feb. 29, 1996. Clerk, U.S. District Court, District Of Columbia

MEMORANDUM AND ORDER

This case is currently before the Court on Plaintiffs' motion for a preliminary injunction. Plaintiffs seek a preliminary injunction prohibiting the defendants from distributing funds recovered by the Department of Energy ("DOE") for crude oil overcharges to the United States Treasury and the States of the United States. As the Court finds that plaintiffs lack standing to challenge DOE's distribution of crude oil overcharges,

plaintiffs' motion for a preliminary injunction will be denied and the underlying and related cases will be dismissed.

In 1970, Congress passed the Economic Stabilization Act ("ESA") in an attempt to control inflation. Section 203 of the ESA authorized the President to issue orders and regulations to stabilize prices. Section 209 of the ESA authorized the courts to order restitution of funds received in violation of any such order or regulation. In addition, Section 210 of the ESA allowed a person suffering a legal wrong because of a violation of price regulations to bring a private action against the violator.

In their motion for a preliminary injunction, plaintiffs seek an order enjoining DOE from distributing escrow funds recovered pursuant to DOE's settlement with Occidental Petroleum that the 20 percent set-aside of crude oil refunds for individual claimants has proven insufficient to satisfy the claims of all such claimants, and that if they succeed on their underlying claim, they and others similarly situated will be entitled to more than 20 percent of the Occidental settlement fund to make up for the fact that they have been under-compensated in past settlement distributions.

This matter was last before the Court on February 8, 1996, for a hearing on plaintiffs' motion for a temporary restraining order.

Based on the government's representations to the Court that the Occidental funds would not be distributed until at least March 1, 1996, the Court took no action at that time.[1]

The defendants contend that plaintiffs lack standing to bring their claims. As there is no statutory right of review afforded to plaintiffs, the plaintiffs must show that they fall within the zone of interests meant to be protected by the statutory scheme. Air Courier Conference of America v. American Postal Workers Union, 498 U.S. 517, 523 (1991). It is not sufficient for petitioners to be merely incidental beneficiaries. Id. at 524.

The purpose of an ESA Section 209 proceeding such as that at issue here is to enforce public rights and to ensure the enforcement of DOE's administrative regulations on a national scale. Payne 22 Inc. v. United States, 762 F.2d 91, 95 (TECA

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[1]Certain States have moved to intervene in this action. Those States are not entitled to intervene as a matter of right under Fed. R. Civ. P. 24(a) because their interests are similarly represented by States already in the action. However, the Court is allowing permissive intervention pursuant to Fed. R. Civ. P. 24(b) since the petitioning States have a real economic interest in the outcome of this matter.

1985). This purpose differs from that of ESA Section 210 which expressly authorizes a private party to bring its own action against the overcharging party in order to recover any overcharges it may have suffered. As such, it seems clear that plaintiffs are not within the zone of interests meant to be protected by Section 209.

A long line of cases follows this reasoning, holding that a claimant to a DOE escrow has no standing to challenge DOE's distribution of funds to third parties. Payne 22, Inc. v. United States, 762 F.R.D. 91, 93 (TECA 1985); Consolidated Edison Co. v. Herrington, 752 F.Supp. 1082, 1086 (D.D.C. 1990); United States v. Missouri Self Service Gas Co., 671 F.Supp. 1232, 1239-40 (W.D. Mo. 1987). Plaintiffs claim that these cases are distinguishable because they address challenges to the distribution of funds to third parties, whereas here plaintiffs challenge the allocation of recovered funds. This distinction is superficial. A challenge to the allocation of refunds held in escrow is simply another way of phrasing a challenge to the distribution of such funds to third

parties, here the States and the federal government.[2]

On this basis, the Court finds that plaintiffs, who rather than choosing to pursue their private right of motion under ESA Section 210, opted to take a share of the funds recovered by DOE under its ESA Section 209 proceedings, do not have standing to assert their claims, all of which amount to a challenge to DOE's distribution of overcharge funds.

Accordingly it is this 29th day of February, 1996,

ORDERED that the motion of Delaware, Hawaii, Illinois, Kansas, Nebraska, Nevada, North Carolina, Rhode Island, and West Virginia, the Territory of Guam and the Virgin Islands to intervene is GRANTED; and it is further

ORDERED that plaintiffs' motion for a preliminary injunction be and hereby is DENIED; and it is further

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[2]Plaintiffs' argument that the Federal Circuit's ruling in Mullins v. DOE, 50 F.3d 990 (Fed. Cir. 1995) is now controlling on the issue of claimant standing is similarly unavailing. Although the Mullin court did review DOE's allocation of settlement funds between crude oil and refined oil products, it did not address the issue of standing.

ORDERED that case No. 96-0225 is dismissed; and it is further

ORDERED that case No. 95-0698 is dismissed.

HAROLD H. GREENE
United States District Judge

United States Court of Appeals
for the Federal Circuit
96-1248, -1257

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY,
Plaintiffs-Appellants,

v.

Hazel R. O'Leary, SECRETARY OF ENERGY, and George B. Breznay, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY,
Defendants-Appellees,

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, and WYOMING,
Defendants-Appellees,

and

STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND, and WEST VIRGINIA, and TERRITORY OF GUAM AND THE VIRGIN ISLANDS,

Defendants-Appellees.

O R D E R

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the suggestion for rehearing in banc having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED, and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, DECLINED.

The mandate of the court will issue on August 22, 1997.

FOR THE COURT,
JAN HORBALY, CLERK

By_____
Alex Van Veen
Staff Law Clerk

Dated: August 15, 1997

Filed Aug. 15, 1997
U.S. Court of Appeals
For the Federal Circuit
Jan Horbaly, Clerk

"Sec. 209. Injunctions and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"Sec. 210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a

declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided*, That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received repayment of such overcharge within

ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"Sec. 211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in any such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

EMERGENCY PETROLEUM ALLOCATION
ACT OF 1973

Sec. 5(a)(1) Except as provided in paragraph (2), (A) sections 205 through 207 and sections 209 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

Sec. 7192. Judicial review

(a) Agency action

Judicial review of agency action taken under any law the functions of which are vested by law in, or transferred or delegated to the secretary, the Commission or any officer, employee, or component of the Department shall, notwithstanding such vesting, transfer, or delegation, be made in the manner specified in or for such law.

PETROLEUM OVERCHARGE DISTRIBUTION AND RESTITUTION ACT OF 1986

Sec. 4502. Identification and disbursement of restitutionary amounts

(a) In general

(1) Subject to paragraph (2)--

(A) all rulings, policies, or other statements (including any administrative order or settlement agreement) issued after October 21, 1986, by any office, official, or employee of the Department of Energy; and

(B) all orders, including declaratory judgments, issued by any court after October 21, 1986, shall be consistent with the provisions of this chapter.

(2) Nothing in this section shall affect the settlement approved on July 7, 1986, in In Re: the Department of Energy Stripper Well Exemption Litigation M.D.L. No. 378, in the United States District Court for the District of Kansas.

(b) Disbursement of restitutionary amounts as direct restitution to injured persons

(1) The Secretary shall, through the Office of Hearings and Appeals of the Department of Energy, conduct proceedings expeditiously in accordance with subpart V

regulations for the purpose of, to the maximum extent possible--

(A) identifying persons or classes of persons injured by any actual or alleged violation of the petroleum pricing and allocation regulations issued pursuant to the Emergency Petroleum Allocation Act of 1973 [15 U.S.C.A. §751 et seq.] or the Economic Stabilization Act of 1970 [12 U.S.C.A. §1904 note];

(B) establishing the amount of any injury incurred by such persons; and

(C) making restitution, through the disbursement of amounts in the escrow accounts described in subsections (b) and (d) of section 4501 of this title, to such persons.

(2) In conducting such proceedings, the Secretary shall take into consideration the reports released pursuant to several orders of the applicable Federal district court in In Re: the Department of Energy Stripper Well Exemption Litigation, M.D.L. No. 378 in the United States District Court for the District of Kansas.

(c) Determination of excess amount to be used for indirect restitution

(1) Within 45 days after October 21, 1986, in the case of fiscal year 1987, and within 45 days after the beginning of each

fiscal year after fiscal year 1987, the Secretary shall, using the best information available to the Secretary, determine and publish (along with a justification thereof) in the Federal Register the amount held in the escrow account described in subsections (b) and (d) of section 4501 of this title that is in excess of the amount that will be needed to make restitution to persons or classes of persons in accordance with subsection (b)(1) of this section and to meet other commitments of such accounts (including the requirements of section 155 of Public Law 97-377). In making such determination, the Secretary shall give primary consideration to assuring that at all times sufficient funds (including a reasonable reserve) are set aside for making such restitution and meeting such other commitments.

(2) The Secretary shall make public the information referred to in the first sentence of paragraph (1).

(d) Disbursement of excess amount as indirect restitution for energy conservation programs

(1) After the publication of the determination of an excess amount under subsection (c) of this section for a fiscal year, the Secretary shall promptly provide for the disbursement of a portion or all of such excess amount for use in energy conservation

programs. The amount so disbursed for a fiscal year shall be the smaller of--

(A) $200,000,000 minus the amount of Federal funds appropriated for energy conservation programs for such fiscal year; or

(B) the amount determined under subsection (c) of this section to be the excess amount for such fiscal year.

(2) After determining the amount to be made available under paragraph (1), the Secretary shall apportion such amount among each of the energy conservation programs in a manner that will provide funding under this chapter for the fiscal year concerned for each of such programs in the same proportionate amount that was provided for each of the programs by the congress for fiscal year 1986. The Secretary shall then make available each amount apportioned for use under an energy conservation program in the same manner, to the same extent, under the same rulings and regulations, and for the same uses that Federal appropriated funds are made available and used under such program.

(3) The Secretary shall require that amounts made available under this subsection are used to supplement, and not supplant, funds otherwise available for energy conservation activities under Federal or State law.

(Pub. L. 99-509, Title III, §3003, Oct. 21, 1986, 100 Stat. 1882.)

FEDERAL COURTS ADMINISTRATION ACT
OF 1992

Sec. 102. Abolition of Temporary Emergency Court of Appeals

(a) APPEALS UNDER ECONOMIC STABILIZATION ACT--Section 211 of the Economic Stabilization Act of 1970 (Public Law 91-379; 84 Stat. 799) is amended by striking subsections (b) through (h) and inserting the following:

"(b) Appeals from orders or judgments entered by a district court of the United States in cases and controversies arising under this title shall be brought in the United States Court of Appeals for the Federal Circuit if the appeal is from a final decision of the district court or is an interlocutory appeal permitted under section 1292(c) of title 28, United States Code."

(b) JUDICIAL REVIEW OF EMERGENCY ORDERS UNDER THE NATURAL GAS POLICY ACT--Section 506(c) of the Natural Gas Policy Act of 1978 (15 U.S.C. 3416(c)) is amended--

(1) in the first sentence, by striking "the Temporary Emergency Court of Appeals, established pursuant to section 211(b) of the Economic Stabilization Act of 1970, as amended," and inserting "the United States Court of Appeals for the Federal Circuit"; and

(2) by striking "Temporary Emergency Court of Appeals" each place

it appears and inserting "United States Court of Appeals for the Federal Circuit."

(c) CONFORMING AMENDMENTS--Section 1295(a) of title 28, United States Code, is amended--

(1) by striking "and" at the end of paragraph (9);

(2) by striking the period at the end of paragraph (10) and inserting a semicolon; and

(3) by adding at the end of the following new paragraphs:

"(11) of an appeal under section 211 of the Economic Stabilization Act of 1970;

"(12) of an appeal under section 5 of the Emergency Petroleum Allocation Act of 1973;

"(13) of an appeal under section 506(c) of the Natural Gas Policy Act of 1978; and

"(14) of an appeal under section 523 of the Energy Policy and Conservation Act."

(d) ABOLITION OF COURT--The Temporary Emergency Court of Appeals created by section 211(b) of the Economic Stabilization Act of 1970 is abolished, effective 6 months after the date of the enactment of this Act.